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Soo Ah Lai & Ors v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42S (A)-(29–31)-02 OF 2013
AMELIA TEE ABDULLAH J
11 APRIL 2014

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Criminal Procedure — Appeal — Appeal to the High Court — Three separate charges under s 13 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 — Whether appellant employers of complainant — Complainant complained of ill-treatment — Whether prosecution case successfully proven — Whether charges defective — Whether there was evidence complainant exploited within meaning of Act — Whether there was proper appreciation of defence case

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The appellants were charged with three separate charges under s 13 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM') and were jointly tried together. The complainant was a 29 year old Cambodian national who had entered Malaysia legally as a domestic maid. She was collected from the agent by the first and third appellants. According to her contract of employment, her employer was the second appellant. From the evidence of the complainant, she regarded all three appellants as her employers. She stayed at the employer's house . Medical evidence showed that she had been beaten by her employers since two or three days after she first started working at the employer's house. She had been punched on the chest, beaten with a hot piece of metal on her forearm; she was not given proper food and forced to work from 5am to 2am on the following day. The session court judge found that the appellants had failed to raise any reasonable doubts as to the truth of the prosecution's case and that the prosecution had proven its case against the appellants beyond all reasonable doubt and had found the appellants guilty on their respective charges and had convicted them, accordingly. The appellants were then sentenced to four years imprisonment. The issues that arose in the present appeal were whether the charges against the appellants were defective in that the mode of exploitation was not stated; whether there was evidence that the victim was exploited within the meaning of s 2 of the ATIPSOM 2007; whether there was proper appreciation of the cross-examination of PW1; and whether there was proper appreciation of the defence case.

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Held, allowing the appeal:

(1) The said charges were not defective. The court was unable to say that the appellants were in any way misled by any omission or error, if indeed there was any omission or error. As such, the appeal was without merit (see para 24).

(2) The complainant was employed under a contract of employment which was entered into between herself and the second appellant. Even if the court were to find that there was a breach of the terms of the said contract of employment, or that the complainant had been abused in any way, that would still not bring the facts of the case within the definition of 'exploitation' in s 2 of the ATIPSOM 2007. According to the complainant, she was to do housework such as the laundry, the dishes, clean mirrors, toilets and mop the floor. The evidence adduced from the complainant did not support any suggestion that she was working without pay. Whilst the complainant might not have received any salary, however she had agreed that certain fees for her coming to Malaysia had been borne by her employer and these sums would be deducted from her initial salary up to seven months. As the complainant appeared not to know or comprehend the mode of payment of her monthly salary, she was also not able to refute if the said monthly salaries were to be paid to her together with her plane ticket upon the expiration of her contract term. Based on such evidence, the court was not able to conclude the complainant was exploited in the sense of her being forced to work without wages or salary (see paras 27, 31, 39 & 40).

(3) The complainant was not confined. She could go outside the house to throw rubbish. She had the keys to the lock on the gate. Whilst it may well have been true that the reason why the complainant had not run away from the house was because she knew no one and did not know where to run to, however these same facts would also show that the complainant was not confined in the house for the purpose of exploitation (see para 41).

(4) There was no evidence of the complainant being trafficked by the appellants for the purpose of exploitation by means of forced labour or other forms of coercion. The complainant herself had never mentioned the date of the alleged exploitation. Quite apart from the fact that the date and time of the alleged act of trafficking as stated in the charge had not been proved or at all by then prosecution, the court will go on to say that cases of this nature should not have been brought under s 13 of the ATIPSOM (see para 42).

(5) The fact that a domestic maid has been ill treated and abused does not ipso facto mean that recourse should be had to the provisions of ATIPSOM just because the penalty under s 13 of ATIPSOM was far heavier than the penalty for voluntarily causing hurt under s 323 of the Penal Code. The court was of the considered view that depending on the

nature of the injuries that were suffered by the complainant and the mode of inflicting those injuries, the case should have been brought under one of the provisions of the Penal Code for voluntarily causing hurt. The prosecution had failed to make out a case under s 13 of the ATIPSOM for trafficking by the use of force or other forms of coercion. Based on the facts of the case as adduced, a charge under s 13 of the ATIPSOM was not in order and the appellants should have been charged under the Penal Code for one of the offences of voluntarily causing hurt (see para 43).

[Bahasa Malaysia summary

Perayu-perayu dipertuduh dengan tiga pertuduhan berasingan di bawah s 13 Anti-Pemerdagangan Orang dan Anti Penyeludupan Migran 2007 ('ATIPSOM') dan dibicarakan bersama-sama. Pengadu merupakan seorang warganegara Kemboja berusia 29 tahun yang memasuki Malaysia secara sah sebagai seorang pembantu rumah. Dia diambil daripada ejen oleh perayu pertama dan ketiga. Menurut kontrak pekerjaannya, majikannya merupakan perayu kedua. Daripada keterangan pengadu, dia menganggap ketiga-tiga perayu sebagai majikannya. Dia tinggal di rumah majikannya. Keterangan perubatan menunjukkan bahawa dia telah dipukul oleh majikannya sejak dua atau tiga hari selepas dia mula bekerja di rumah majikannya. Dia telah ditumbuk di dada, dipukul dengan besi panas di lengannya; dia tidak diberikan makanan sewajarnya dan dipaksa bekerja dari pukul 5 pagi sehingga 2 pagi pada keesokan harinya. Hakim mahkamah sesyen mendapati bahawa perayu-perayu gagal untuk menimbulkan apa-apa keraguan munasabah mengenai kebenaran kes pendakwa raya dan bahawa pendakwa raya telah membuktikan kesnya terhadap perayu-perayu melangkaui keraguan munasabah dan mendapati perayu-perayu bersalah ke atas pertuduhan mereka masing-masing dan dengan itu menyabitkan mereka. Perayu-perayu kemudiannya dijatuhi hukuman empat tahun penjara. Isu-isu yang timbul dalam rayuan di sini adalah sama ada pertuduhan terhadap perayu-perayu cacat kerana cara eksploitasi tidak dinyatakan; sama ada terdapat keterangan bahawa mangsa dieksploitasi dalam ertikata s 2 ATIPSOM 2007; sama ada terdapat penghargaan sewajarnya pemeriksaan balas PW1; dan sama ada terdapat penilaian sewajarnya kes pembelaan.

Diputuskan, membenarkan rayuan:

(1) Pertuduhan tersebut adalah tidak cacat. Mahkamah tidak boleh mengatakan bahawa perayu-perayu dalam mana-mana cara dikelirukan oleh apa-apa peninggalan atau kesilapan, jika sekiranya memang terdapat apa-apa peninggalan atau kesilapan. Oleh itu, rayuan tersebut adalah tanpa merit (lihat perenggan 24).

(2) Pengadu diambil bekerja di bawah kontrak pekerjaan yang dimeterai antara dirinya dan perayu kedua. Walaupun sekiranya mahkamah mendapati terdapat pelanggaran terma-terma kontrak pekerjaan

tersebut, atau bahawa pengadu telah didera dalam apa jua cara, itu masih tidak membawa fakta-fakta kes terangkum dalam definisi 'eksploitasi' dalam s 2 ATIPSOM 2007. Menurut pengadu, dia perlu melakukan kerja rumah seperti membasuh baju, pinggan mangkuk, membersihkan cermin, tandas dan mengelap lantai. Keterangan yang dikemukakan daripada pengadu tidak menyokong apa-apa cadangan bahawa dia bekerja tanpa bayaran. Walaupun pengadu mungkin tidak menerima sebarang upah, namun dia telah bersetuju bahawa bayaran tertentu untuk dia datang ke Malaysia perlu dibiayai oleh majikannya dan jumlah ini akan ditolak daripada gaji permulaannya sehingga tujuh bulan. Memandangkan pengadu kelihatan tidak mengetahui atau memahami cara pembayaran gaji bulanannya, dia juga tidak boleh menyangkal sekiranya gaji bulanan tersebut akan dibayar kepadanya bersama dengan tiket kapal terbangnya selepas tamat tempoh kontraknya. Berdasarkan keterangan tersebut, mahkamah tidak boleh memutuskan pengadu dieksploitasi dalam ertikata dia dipaksa bekerja tanpa upah atau gaji (lihat perenggan 27, 31, 39 & 40).

(3) Pengadu tidak dikurung. Dia boleh pergi ke luar rumah untuk membuang sampah. Dia mempunyai kunci kepada mangga di pagar. Walaupun mungkin benar bahawa alasan mengapa pengadu tidak melarikan diri daripada rumah itu adalah kerana dia tidak mengenali sesiapa dan tidak tahu hendak lari ke mana, walau bagaimanapun fakta-fakta ini juga menunjukkan bahawa pengadu tidak dikurung di dalam rumah bagi tujuan eksploitasi (lihat perenggan 41).

(4) Tidak terdapat keterangan pengadu diseludup oleh perayu-perayu untuk tujuan eksploitasi melalui kerja paksa atau bentuk paksaan lain. Pengadu sendiri tidak pernah menyebut tarikh eksploitasi yang didakwa. Selain daripada fakta bahawa tarikh dan masa tindakan penyeludupan seperti didakwa yang dinyatakan dalam pertuduhan tidak dibuktikan atau sama sekali oleh pendakwa raya tersebut, mahkamah akan terus mengatakan bahawa kes-kes bersifat sebegini tidak sepatutnya dikemukakan di bawah s 13 ATIPSOM (lihat perenggan 42).

(5) Fakta bahawa seorang pembantu rumah telah dilayan secara buruk dan didera tidak secara *ipso facto* bermaksud bahawa bantuan sepatutnya adalah menurut peruntukan ATIPSOM hanya kerana penalti di bawah s 13 ATIPSOM adalah jauh lebih berat berbanding penalti secara sengaja mengakibatkan kecederaan di bawah s 323 Kanun Keseksaan. Mahkamah berpandangan bahawa menurut sifat kecederaan yang dialami oleh pengadu dan cara mengakibatkan kecederaan tersebut, kes tersebut sepatutnya dikemukakan di bawah salah satu peruntukan Kanun Keseksaan kerana dengan sengaja mengakibatkan kecederaan. Pendakwa raya gagal untuk membuktikan kes di bawah s 13 ATIPSOM untuk penyeludupan dengan menggunakan kekasaran atau bentuk

paksaan lain. Berdasarkan fakta-fakta kes seperti yang dikemukakan, satu pertuduhan di bawah s 13 ATIPSOM adalah tidak sah dan perayu-perayu sepatutnya dipertuduh di bawah Kanun Keseksaan kerana salah satu kesalahan mengakibatkan kecederaan secara sengaja (lihat perenggan 43).]

Notes

For cases on appeal to the High Court, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 436–438.

Cases referred to

Ng Yu Wah v PP [2012] 9 MLJ 325; [2012] 4 CLJ 494, HC (distd)
Siti Rashidah bt Razali dan yang lain lwn Pendakwa Raya [2011] 6 MLJ 417; [2011] 9 CLJ 459, HC (distd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 12, 13, 14
Criminal Procedure Code ss 156, 422
Penal Code ss 34, 323

Gooi Soon Seng (Aina Safia Azemi with him) (Gooi & Azura) for the appellants.
Tan Gim Han (Deputy Public Prosecutor) for the respondent.

Amelia Tee Abdullah J:

[1] Soo Ah Lai ('the first appellant'), Yap Siew Ling ('the second appellant') and Yap Siew Lee ('the third appellant') were charged were charged with three separate charges under s 13 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM 2007') and were jointly tried together. The charges against the appellants were similar and reads as follows:

> Bahawa kamu pada 18.2.2012 jam lebih kurang 3.30 petang di No. 139, Jalan 2/62, Bandar Menjalara, Kepong di dalam Daerah Sentul, dalam Wilayah Persekutuan, Bandaraya Kuala Lumpur telah memperdagangkan CHHUM POV PP: N0738836 berumur 28 tahun bagi maksud eksploitasi dengan penggunaan kekerasan atau bentuk paksaan yang lain terhadap CHHUM POV PP: N0738836 dan dengan demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 13 Akta Anti permerdagangan Orang dan Anti penyeludupan Migran 2007.

[2] At the end of the prosecution case, the learned *hakim mahkamah sesyen* ('HMS') had found that a prima facie case had been made out and had called on the three appellants to enter upon their defence. The appellants had elected to give their evidence on oath. At the end of the defence case, the learned HMS

found that the appellants had failed to raise any reasonable doubts as to the truth of the prosecution case. The learned HMS had also found that that the prosecution had proven its case against the appellants beyond all reasonable doubt and had found the appellants guilty on their respective charges and had convicted them accordingly. After hearing and considering the mitigation of the appellants, the learned HMS had sentenced each of the appellants to four years imprisonment.

[3] Being dissatisfied with the decision of the learned HMS, the appellants have appealed against the *keseluruhan keputusan tersebut*. The court notes that nowhere in the petition of appeal is there any ground to the effect that the sentence imposed was excessive and should be reduced. From this, the court understands that the appellants' appeals are in fact appeals against their convictions and the sentences that were consequently imposed following their convictions on the charges.

BRIEF FACTS OF THE CASE

[4] The complainant, Chhum Pov PP N0738836 ('PW 1') is a 29 year old Cambodian national. It is not in dispute that she had entered Malaysia legally as a domestic maid on the 23rd although she was uncertain of the month or the year. PW 1 was collected from the agent by the first and third appellants. According to her contract of employment, her employer is Yap Siew Ling, the second appellant. However, from the evidence of the complainant, it would appear that she regarded all three appellants as her employers. She stayed at the employer's house where her daily tasks would include washing the clothes, washing the dishes, cleaning the *cermin*, the toilets, mopping the floor and ironing the clothes. She was not required to do any cooking.

[5] Although the complainant was initially treated well, she was later 'exploited' by the appellants through various bad treatment, which included:

(a) being forced to sleep *merata-rata* in the kitchen and in an area outside the kitchen which although roofed, was without walls and was used as a store for storing household and kitchen appliances;

(b) not being given basic amenities for sleeping such as a pillow and a blanket;

(c) being forced to work without adequate rest from as early as 5am to 2am daily;

(d) not being given proper food;

(e) being tortured and beaten by the appellants through various ways such as being beaten on both legs with a long pole, being beaten with a

spatula, a step ladder, having her hair pulled, having her face beaten with a toilet brush, being slapped and being thrown on the floor and then kicked in the chest; and

(f) being forced out of the house and left to sleep under the tree at the back of the house.

[6] Dr Samir Imran ('PW 6') had examined the complainant at Hospital Selayang on 19 February 2012. From her history taking, he found that the complainant had been beaten by her employers since two or three days after she first started working at the employer's house. She had been punched on the chest, beaten with a hot piece of metal on her forearm; she was not given proper food and forced to work from 5am to 2am on the following day.

[7] From a physical examination of the complainant, Dr Samir had noted that the complainant was very thin (*kurus kering*) and appeared to be tired and lifeless (*nampak keletihan dan tidak bermaya*). He noted various injuries on the complainant's body, both new as well as old injuries. These injuries were:

(a) on the head — bruises that had occurred within the previous 24 hours;

(b) injuries on both cheeks but more severe on the left cheek. These could have been caused by repeated beatings or slaps, or being slammed against the wall;

(c) right shoulder — signs of injury with something hot like an iron;

(d) right hand — there were two signs of injury with a hot object at the back of the hand. As this injury was still red, it would have occurred between 24 hours and four days; and

(e) body — various scars on her back which shows that she had been beaten.

[8] The court notes the evidence of Kosai Chhay ('PW 7'), the third secretary at the Cambodian consulate, to the effect that after he received a message from an agency about a maid being abused, he had gone to the employer's house at 139, Jalan 2/62, Bandar Menjalara, Kepong. There, he had asked for the maid Chhum Pov but was told that the said maid had run away five months earlier. However, upon receiving information from the agency that the maid was actually at the back of the employer's house, he had returned to the house where, from the neighbour's compound, he had seen the maid Chhum Pov lying on the ground. As to the condition of Chhum Pov at the material time, PW 7 described her as follows:

> The maid was smelly and dirty because she was lying down on the land. I call her from the neighbour's compound. There is a fence there. After I called her, she said 'Help me. Help me'. I spoke in Cambodian. I said: I come here to help you. Don't be scared.

[9] Since the complainant would not appear to know much about the details of her salary and the mode of paying it, the court would have to look at the evidence of Cheong Sum Wan ('PW 2') for assistance. She is a marketing executive with Agensi Pekerjaan Kumpulan Overseas Sdn Bhd which is involved, inter alia, with the processing of foreign maids. She confirmed that Chhum Pov had entered Malaysia in March 2010 and had been collected from the agency by her employer, Yap Siew Ling (the second appellant). She identified P7 as the contract of employment between the complainant and her employer. Under the said contract, the employee's monthly wages is RM550 per month. According to PW 2, the wages would only be payable only after eight months because *di negara sumber pembantu itu tak payah bayar apa-apa kepada agent negara sumber*. It is also important to note that according to PW 2, *gaji disimpan oleh majikan hinggalah pembantu pulang ke negara asal*. She confirmed during cross-examination that the maid had agreed for her wages to be kept by her employer until the expiration of her contract. The court finds this evidence to be very pertinent and material because it negatives any suggestion that the complainant was working for the appellants without wages.

THE GROUNDS OF APPEAL

[10] Before me, learned counsel for the appellants has submitted that there are four broad grounds of appeal, namely:

(a) that the charges against the appellants were defective in that the mode of exploitation was not stated;

(b) there is no evidence that the victim was exploited within the meaning of s 2 of the ATIPSOM 2007;

(c) there was no proper appreciation of the cross-examination of PW 1; and

(d) there was no proper appreciation of the defence case.

[11] The court will deal with each of these grounds in turn.

(A) The charge — whether defective

[12] The appellants' first ground of appeal relates to the charges against them in this case. It is the appellants' submission that the charges that were framed against them were defective in that the mode or form of exploitation that was alleged against them had not been specifically stated in the charges. Reliance was placed on the cases of *Siti Rashidah bt Razali dan yang lain lwn Pendakwa Raya* [2011] 6 MLJ 417; [2011] 9 CLJ 459 and *Ng Yu Wah v Public Prosecutor* [2012] 9 MLJ 325; [2012] 4 CLJ 494 in support of the appellants' proposition that for a charge under s 13 of the ATIPSOM 2007, the specific form of the exploitation that was alleged to have been committed by the

appellants should be clearly stated. The appellants submit that as this was not done, the charges were totally defective and this amounted to an illegality which is not curable under s 422 of the Criminal Procedure Code. In consequence thereof, the appellants submit that the appellants should be acquitted and discharged at the end of the prosecution case on this ground alone.

[13] On this issue, the learned deputy public prosecutor has submitted that even though the charges against the appellants had not set out the form or type of exploitation committed by the appellants, however this did not render the charges defective. According to the learned deputy, the omission had not prejudiced the prosecution's case because, as can be seen from the notes of evidence, the appellants were not at all misled (*tersalah arah*) in their defence. They had correctly understood that the form of exploitation in the instant case is forced labour based on their cross-examination of the complainant. It was submitted that from the notes and the appeal records, the appellants were well able to defend themselves on the charges.

[14] The learned deputy had also relied on the provision of s 156 of the Criminal Procedure Code which reads as follows:

> Section 156 Effect of errors.
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material *unless the accused was in fact misled by that error or omission*.
>
> (Emphasis added.)

[15] In coming to a decision on this first issue as to whether the charges are defective for failing to set out the mode or form of exploitation, the court has carefully perused the provision of s 13 of the ATIPSOM 2007 which reads as follows:

> Any person who traffics in persons, not being a child, for the purpose of exploitation, by one or more of the following means:
>
> (a) threat;
>
> (b) use of force or other forms of coercion;
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> (c) abduction;
>
> (d) fraud;
>
> (e) deception;
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> (f) abuse of power;

(g) abuse of the position of vulnerability of a person to an act of trafficking in persons; and

(h) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person,

commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

[16] Also relevant to the court's consideration on this issue is s 2 of the ATIPSOM 2007 where the word 'exploitation' is defined as 'all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.'

[17] The court has also carefully perused the two authorities as cited by learned counsel for the appellants. In the case of *Siti Rashidah bt Razali & Yang Lain lwn Pendakwa Raya*, the four appellants were charged with two offences under s 12 and s 14 of the ATIPSOM 2007. The immigration authorities had raided a house where they had found seven men, two women, and three children, all Myanmar citizens in a room. They had no valid passes or travel documents for entering Malaysia. The appellants had pleaded guilty to the charges and the learned magistrate had sentenced the first, second and third appellants to three years imprisonment in respect of each of the charges to run concurrently, and the fourth appellant to four years imprisonment on the first charge and to five years imprisonment on the second charge, such sentences to run concurrently. Being dissatisfied, the appellants had appealed against their sentences and the validity of their sentences.

[18] In the case of *Siti Rashidah*, the issue that arose was whether the prosecution had failed to prove the ingredients of the offence, namely the element of exploitation. In that case, the learned judge found that the facts of the case and the evidence adduced showed that the alleged victims had come to Malaysia to seek work and a better life. They were working at construction sites and not as slaves or doing illegal acts such as robbing or cheating. It was also noted that at the time of the immigration raid, the alleged victims were watching television or eating. They were free to move in and out of the house; they were not tied up or confined. The court found that they were not trafficked persons.

[19] lt is true that in the case of *Siti Rashidah*, Azman Abdullah J had gone on to advise as follows:

Bagi tujuan kefahaman kepada pertuduhan di bawah s 12, 13 dan 14 Akta ini, adalah dinasihatkan untuk pihak pendakwaan di masa akan datang memasukkan di dalam pertuduhan apakah aktiviti 'exploitasi' yang dimaksudkan sama ada

> exploitasi seks seperti pelacuran, abdi, buruh paksa atau kegiatan haram. Oleh kerana s 2 memberi maksud 'eksploitasi' itu lebih dari satu kegiatan maka perlu dinyatakan dalam pertuduhan, eksploitasi seks atau buruh paksa atau perhambaan atau pengabdian atau aktiviti haram atau pemindahan organ. Dengan sifat pertuduhan secara spesifik begini ianya lebih menepati kehendak ss 12, 13 atau 14 Akta ini.

[20] In the case of *Ng Yu Wah v Public Prosecution* [2012] 9 MLJ 325; [2012] 4 CLJ 494, the appellant was charged with trafficking a two-month old child, an offence under s 14 of the Anti Trafficking in Persons Act 2007 read with s 34 of the Penal Code. He was convicted and sentenced to five years imprisonment with effect from the date of his conviction. The issue that arose in that case was whether the charge was a valid or proper charge. The court notes that in *Ng Yu Wah*'s case, there was no mention of the words 'for the purpose of exploitation' or the mode or particulars of that exploitation. There, the learned High Court judge had held as follows:

> ... since the material statutory words denoting mens rea which is an essential ingredient of the offence, on the facts of this case an averment should incorporate the following words namely, 'bagi maksud exploitasi iaitu pemindahan milikan, jagaan atau kawalan ke atas kanak-kanak tersebut dengan pertukaran wang ringgit menyalahi a. 48 Akta Kanak-Kanak 2001 (Akta 611)'. As they were omitted from the charge, the indictment is therefore wholly defective and the defect is not curable under s 422 of the Criminal Procedure Code: see *Basri Md Desa*'s case.

[21] Accordingly, the learned judge in the case of *Ng Yu Wah* had allowed the appellant's appeal and set aside her conviction and sentence by the court below.

[22] The case of *Siti Rashidah* can be easily distinguished from the facts of our instant case. A look at the two charges in that case will show that the appellants there were charged with trafficking *bagi maksud exploitasi* without stating or at all the mode of the exploitation. In our instant case, the charges against the three appellants reveal that they were charged with trafficking in Chhum Pov *bagi maksud eksploitasi dengan penggunaan kekerasan atau bentuk paksaan yang lain*. As such, the court is of the considered view that in our instant case, the prosecution had gone further than in *Siti Rashidah* to clearly state the mode of exploitation of the said Chhum Pov, that is, through the use of force or other forms of coercion. As such, the charges in our present case cannot be equated with the charges in the case of *Siti Rashidah*.

[23] Similarly, the case of *Ng Yu Wah* too can be easily distinguished. The defects in the charge in that case can be clearly seen. Not only was there no mention in the charge that the alleged trafficking was for the purpose of exploitation, there was also no clear words denoting the mode or particulars pertaining to that exploitation.

[24] Thus on this issue as to whether the charges against the appellants were defective, the court is of the considered view that the said charges were NOT defective. The court is unable to say that the appellants were in any way misled by any omission or error, if indeed there was any omission or error. As such, the court finds this ground of appeal to be without merit.

(B) Whether there was evidence of the victim being exploited within the meaning of section 2 of the ATIPSOM 2007

[25] In this regard, learned counsel for the appellants has referred the court to s 2 of the ATIPSOM 2007 and the overall intention of the Act. It is submitted that the purpose of the exploitation is the mens rea or the mental element of an offence under s 13 of the ATIPSOM 2007. As has been stated earlier, the word 'exploitation' has been defined to mean all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs. It follows therefrom that to prove a case under s 13 of the ATIPSOM 2007, the prosecution would need to prove that the victim was exploited by the appellants in one or more of the forms of exploitation as defined in s 2.

[26] Learned counsel for the appellants has submitted that to establish the basic ingredient of exploitation for the purpose of trafficking in persons, it must be proven that the victim had been coerced, forced or deceived into doing something which falls within one of the forms of exploitation as defined in s 2 which she would not have done had she not been so coerced, forced or deceived into doing.

[27] However, in this case, the complainant was employed under a contract of employment (P7) which was entered into between herself and Yap Siew Ling, the second appellant. Learned counsel has submitted that even if the court were to find that there was a breach of the terms of the said contract of employment, or that the complainant had been abused in any way, that would still not bring the facts of the case within the definition of 'exploitation' in s 2 of the ATIPSOM 2007. Learned counsel submits that the complainant was not coerced into coming to Malaysia to work for the appellants and neither was she instructed to do or perform any work beyond her job scope as a domestic household worker.

[28] However, on this issue, learned deputy public prosecutor has submitted that the breach of the terms of the contract of employment by the appellants would turn the complainant's labour into forced labour. It is indeed unfortunate that learned deputy had not furnished any authorities whatsoever in support of this most novel and interesting submission. Learned deputy goes on to equate forced labour with penderaan or abuse. It was submitted that the

treatment of the complainant, the long hours of work, the failure to pay her salary and the assault on the complainant would lead to the conclusion that the labour of the complainant was forced labour.

[29] In considering the merits of this ground of appeal, the court must first state that ATIPSOM 2007 is a specific Act enacted to curb, inter alia, activities of trafficking in persons. 'Trafficking' is defined to include all actions involved in acquiring or maintaining the labour or services of a person through coercion. This would include the act of recruiting the person trafficked, conveying, transferring, harbouring, providing or receiving a person for the purpose of trafficking.

[30] To whom will the provisions of this Act apply? It applies to citizens of Malaysia as well as persons who have come into the country, either legally or illegally. Citizens as well as non-citizens may well be trafficked if they were forced or coerced to do work or to supply services which they had not agreed to do or perform. As an example, a person may have been brought into the country on the pretext of obtaining employment as an entertainer or singer at a hotel. Instead, she is confined and forced into prostitution. Or persons may have been abducted or deceived or threatened into situations where they are exploited within the meaning of s 2 of the ATIPSOM 2007. The permutations are countless.

[31] However, in the instant case, it is the court's finding that the complainant had come into this country legally. She was recruited as a domestic household worker or a maid as evidenced by her contract of employment. In court, she had described the scope of the duties that she was to perform. According to the complainant, she was to do housework such as the laundry, the dishes, clean mirrors, toilets and mop the floor. She did not do any cooking and had never helped her employers to cook. The first and second appellants would do the cooking in the house. The complainant claimed that after she was awakened at 5am by the first appellant, she would do the laundry, clean the table, mop in front of the house, clean the back of the house, clean the three rooms upstairs, clean the living room, clean the toilet and do the dishes. She had washed the car only twice during the tenure of her employment.

[32] As regards her hours of work, the complainant claimed that during the first week of her employment, she had worked from 6am–9pm. For the second week, her working hours were extended to 11pm. And for the following week, she had to work from 5am to 2am. She claimed that her only rest time was during her meal time.

[33] Re food, it is the complainant's evidence that she did not have breakfast. She had lunch at 1pm and sometimes skipped dinner or else had her dinner at 2am. She would have 'rice and some food leftover like meat, vegetable and other food leftover'.

[34] As regards the place where she slept, it is the complainant's evidence that for the first two weeks, she had slept in a room on the first floor. After that she was asked to sleep 'in the store room or sometimes in the living room, or sometimes on the floor and sometimes outside the house without any pillow or blanket'. She claimed that she was asked to sleep at all these various places by the first appellant. She admitted that she had never asked for a pillow and blanket but denied that the first appellant had asked her whether she wanted a pillow and blanket and she had said 'No'.

[35] The complainant claimed that she was beaten. The following is an account of the abuse that she allegedly received:

> My employer throw me on the floor and use the leg to kick my chest and sometimes used long stick to hit my mouth and my mouth and teeth bleeding. Sometimes they use the toilet brush to brush off my face.
>
> Sometimes they used their hand to slap my face. One of my employer used spatula to hit my back and used a stool, pull my hair with hand and hit with stool. Also used a stick to hit both my legs.
>
> Sometimes used slipper to hit my head.

In reply to questions as to the dates when she was beaten or hit, the complainant was only able to say that she did not remember. She also could not remember how many times that she was beaten.

[36] As regards which of the appellants had assaulted her, the court has managed to derive the following from the complainant's account of her abuse, namely:

(a) 'the old lady', namely the first appellant, was identified as having used a stick to hit the complainant's leg, using a spatula and a stool to hit her;

(b) the second appellant was identified as having used a broom to hit the complainant until the broom broke; and

(c) the third appellant was identified as having used a stool to hit the complainant, slapping her and using a toilet brush to brush the complainant's face.

[37] In respect of her salary, the complainant says that she does not know how much was her salary and her agent had also never told her how much it was. She did not know the mode of payment of her salary. She worked for

almost two years and she never got paid. During the two years, she never received any salary and she never asked for salary. However, she had told the court a story about how after eight months, she had received a phone call from her mother in Cambodia asking her to send back USD1,500. She had asked her employers but they had not given her the USD1,500 to send back to Cambodia. During cross-examination, the complainant admitted that she knew that the employer had to pay a few thousand dollars to the agent to obtain her visa etc. She agreed that the employer had paid all the necessary fees for her to work in Malaysia. She agreed that she knew that there will be a deduction of her salary to cover those payments. However, she claimed that she had no knowledge that the agency had asked her employer to keep her RM550 monthly salary after the seventh month and the money would be payable to her together with her airline ticket upon the expiry of her contract of employment. However, she agreed that such an arrangement was good for her.

[38] Thus the issue that arises for consideration is this: Even if the complainant had indeed been abused by one or other or all of the appellants, even if the complainant's account of the various abuses were found to be credible and true and not exaggerated and growing and increasing with the telling, as alleged by the appellants, was this enough to bring this case within the meaning of s 13 of the ATIPSOM 2007?

[39] From the evidence adduced, the court finds that the complainant knew that she was coming to Malaysia to work as a maid. There is no suggestion that she was stolen away from Cambodia without her knowledge or consent. Although she did not understand or read English, the court accepts that she knew that she had entered into a contract of employment to work as a domestic maid because admittedly the contract of employment was witnessed by persons from the embassy or the employment agency. The court further accepts that during the period of her employment with the appellants, she had done household work. There is no evidence or even any suggestion that she had done anything other than household work which she was contracted so to do.

[40] The court also finds that the evidence adduced from the complainant does not support any suggestion that she was working without pay. Whilst the complainant may not have received any salary, however she had agreed that certain fees for her coming to Malaysia had been borne by her employer and these sums would be deducted from her initial salary up to seven months. As the complainant appeared not to know or comprehend the mode of payment of her monthly salary, she was also not able to refute if the said monthly salaries were to be paid to her together with her plane ticket upon the expiration of her contract term. Based on such evidence, the court is not able to conclude the complainant was exploited in the sense of her being forced to work without wages or salary. The court is also of the considered view that the incident

recounted by the complainant where she had asked the appellants for USD1,500 to send back to her mother in Cambodia, which was not allowed, cannot assume any significant importance. Since the request for the USD1,500 was made after she had been working eight months, then, if the initial seven months' salary were rightfully deducted by the employer, the complainant would not be entitled at the eighth month of employment to the USD1,500 as per her request.

[41] The court also notes from the evidence adduced that the complainant was not confined. She could go outside the house to throw rubbish. She had the keys to the lock on the gate. Whilst it may well have been true that the reason why the complainant had not run away from the house was because she knew no one and did not know where to run to, however these same facts would also show that the complainant was not confined in the house for the purpose of exploitation.

[42] Thus, looking at all the evidence adduced in this case, especially the evidence of the complainant, the court is satisfied that the there is no evidence of the complainant being trafficked by the appellants on 18 February 2012 at 3.30pm (as per the charge) for the purpose of exploitation by means of forced labour or other forms of coercion. The court notes that the complainant herself had never mentioned the date 18 February 2012. Quite apart from the fact that the date and time of the alleged act of trafficking as stated in the charge had not been proved or at all by then prosecution, the court will go on to say that cases of this nature should not have been brought under s 13 of the ATIPSOM 2007.

[43] The court would clearly state for the record that it does not condone, nay that it positively abhors, any form of ill treatment of domestic help. However, the fact that a domestic maid has been ill treated and abused does not ipso facto mean that recourse should be had to the provisions of ATIPSOM 2007 just because the penalty under s 13 of the ATIPSOM 2007 is far heavier than the penalty for voluntarily causing hurt under s 323 of the Penal Code. The court is of the considered view that depending on the nature of the injuries that were suffered by the complainant and the mode of inflicting those injuries, the case should have been brought under one of the provisions of the Penal Code for voluntarily causing hurt.

[44] In light of the court's findings as stated above, there would be no necessity for the court to deal with the third and fourth ground of appeal since the court is of the considered view that the defence should not have been called in the first place.

A CONCLUSION

[45] In conclusion, the court is satisfied that the learned HMS was in error when she found that a prima facie case had been made out on the charge. The court is satisfied that the prosecution had failed to make out a case under s 13 of the ATIPSOM 2007 for trafficking by the use of force or other forms of coercion. The court is further satisfied that based on the facts of the case as adduced, a charge under s 13 of the ATIPSOM 2007 was not in order and the appellants should have been charged under the Penal Code for one of the offences of voluntarily causing hurt.

[46] The court has also considered whether it should amend the charges against the appellants at this stage. However, in light of the fact that the appellants had been called to enter upon their defences on the charges under s 13 of the ATIPSOM 2007 by the learned HMS, and had in fact tendered evidence for their defences on the said charge, the court is of the considered view that any amendment of the charges at this stage of proceedings would cause grave injustice to the appellants because during the trial at the sessions court they were defending against totally different charges.

[47] As such and in conclusion, the court would allow the appellants' appeals, set aside the convictions and sentences of the appellants by the court below and to be substituted with an order of acquittal and discharge.

Appeal allowed.

Reported by Afiq Mohamad Noor